218691

GALLAND, KHARASCH, GREENBERG, FELLMAN & SWIRSKY, P.C.

ATTORNEYS AT LAW

CANAL SQUARE 1054 THIRTY-FIRST STREET, NW WASHINGTON, DC 20007-4492
TELEPHONE: 202/342-5200 FACSIMILE: 202/342-5219

RICHARD BAR
DEREK A. BLOOM
BRENDAN COLLINS
STEVEN JOHN FELLMAN
EDWARD D. GREENBERG
DAVID K. MONROE
TROY A. ROLF
DAVID P. STREET
KEITH G. SWIRSKY

*NOT ADMITTED IN DC
°OF COUNSEL

GARY I. HOROWITZ
KATHARINE FOSTER MEYER
CHRISTOPHER B. YOUNGER*

ROBERT N. KHARASCH°
JOHN CRAIG WELLER°

GEORGE F. GALLAND (1910-1985)

MINNESOTA OFFICE:
700 TWELVE OAKS CENTER DRIVE, SUITE 204
WAYZATA, MN 55391
(T) 952/449-8817 (F) 952/449-0614

WRITER'S DIRECT E-MAIL ADDRESS
egreenberg@gkglaw.com

WRITER'S DIRECT DIAL NUMBER
202/342-5277

February 22, 2007

VIA EMAIL

Mr. Vernon Williams, Secretary
Office the Secretary
Surface Transportation Board
1925 K Street, NW – Room 700
Washington, DC 20423-0001

Re: STB Docket No. WCC-101, *Government of The Territory of Guam v. Sea-Land Service, Inc., American President Lines, Ltd. and Matson Navigation Company, Inc.*

Dear Mr. Williams:

In connection with the above-referenced proceeding, enclosed for filing is the Petition of the Government of the Territory of Guam for Reconsideration of the Board's Phase II Decision.

If you have any questions, please do not hesitate to contact me.

Very truly yours,

/Edward D. Greenberg

cc: All Parties on Service List [via Email/US Mail as noted]

BEFORE THE
SURFACE TRANSPORTATION BOARD

GOVERNMENT OF THE TERRITORY OF GUAM,	)	
Plaintiff,	)	
v.	)	Docket No. WCC-101
SEA-LAND SERVICE, INC.; AMERICAN PRESIDENT LINES, LTD; and MATSON NAVIGATION COMPANY, INC.,	)	
Defendants.	)	

PETITION FOR RECONSIDERATION
OF THE GOVERNMENT OF THE TERRITORY OF GUAM

The Government of the Territory of Guam ("GovGuam") hereby respectfully submits this Petition for Reconsideration of the Surface Transportation Board's ("STB") Phase II Decision in this proceeding, served February 2, 2007, pursuant to 49 C.F.R. § 1115.3. As set forth more fully below, GovGuam believes that the Phase II Decision involves material error in three respects and should be reconsidered.

First, the Board should reconsider its determination to bifurcate Phase III to determine first whether there is effective competition in the Guam trade as a threshold to addressing the reasonableness of the challenged rates. Second, if the Board does not reconsider its decision to bifurcate Phase II, the Board should revise the procedural schedule to allow sufficient time to conduct discovery on market dominance issues. Third, the Board should reconsider its conclusion regarding the application of the zone of reasonableness in this case as premature, and should instead wait until the factual record in this proceeding has been fully developed.

I. THE BOARD SHOULD RECONSIDER ITS DECISION TO BIFURCATE PHASE III IN ORDER TO CONDUCT A SEPARATE MARKET DOMINANCE ANALYSIS

In its Phase II Decision, the Board has determined to bifurcate Phase III of this proceeding to determine whether there is effective competition in the Guam noncontiguous domestic market as a precondition to addressing the question of whether the challenged rates in the Guam trade are reasonable. Phase II Decision at 5-7. The Board has stated that the availability of competitive alternatives is an affirmative defense to a rate reasonableness challenge, and that the Board will *assume* that the challenged rates are reasonable – and dismiss the Complaint – if the carriers are able to show that effective competition exists in the Guam market. *Id.* at 6-7. As a result, the Board has established a threshold test for rate reasonableness review similar, if not identical, to the market dominance test applied in rail rate cases.

The Board's Phase II Decision apparently contemplates that the parties in this proceeding will prepare evidentiary presentations – similar to, but less detailed than, those submitted in rail rate cases under the Board's market dominance guidelines[1] – addressing qualitative and structural factors affecting the competitiveness of the Guam market. In particular, the Board's Phase II Decision strongly suggests that the Board expects to consider only market structure factors and/or whether competitive alternatives exist in the marketplace, but not whether those factors and alternatives have indeed been effective in producing reasonable rates. *See* Phase II Decision at 6-7. ("If the Carriers satisfy their burden of proof to show effective competition, we can assume that the challenged rates are reasonable and we will dismiss the complaint.")

---

[1] The Phase II Decision provides GovGuam only 30 days to respond to the carriers market dominance presentation, and makes no provision for discovery by GovGuam. Since most of the evidence relevant to market power and competitive conditions in the Guam trade is not available to GovGuam without extensive discovery from the carriers, it seems clear that the Board is not expecting a detailed and fact intensive analysis of the Guam trade.

The Board should reconsider its decision to bifurcate the Phase III proceeding for several compelling reasons. First, the Board cannot discharge its statutory obligations to determine the reasonableness of past or existing rates, once challenged, by relying solely on the competitive characteristics of the market. As discussed more fully below, the Supreme Court has repeatedly found that such an approach would be tantamount to complete deregulation of rates in direct violation of the Congressional mandate that agencies ensure that regulated rates are reasonable. Indeed, no court decision – including the decisions cited by the Board – has permitted an agency to avoid determining the reasonableness of challenged rates by relying on the purported competitive nature of the market in which the rates were established.

Second, a full analysis of whether there is effective competition in the Guam market – unencumbered by the statutory market dominance threshold applicable to rail carriers – requires an examination not only of available competitive alternatives and the structure of the market, but also the degree to which those factors have been effective in producing rates that are reasonable. As the ICC and the Board itself have noted, effective competition means "competition adequate to restrain ... rates at or below the maximum reasonable level." *McCarty Farms, et al. v. Burlington Northern, Inc.*, 3 I.C.C.2d 822, 831 (1987). *See also West Texas Utilities Co. v. Burlington Northern Railroad Co.*, STB Docket No. 41191 (Decision served May 3, 1996) at 7. Accordingly, in order for GovGuam to present a complete analysis regarding the existence of effective competition, it must be able to address the rates, costs, contractual and financial arrangements and other factors prevailing in the trade for the entire period from 1996 to the present.[2] However, in order to make such a

---

[2] As discussed below regarding the proper application of the ZOR, it is not at all clear at this point whether GovGuam will be limited to challenging only the base rates existing in September 1996. As a result, any market analysis must look at the competitive condition existing throughout the entire 1996-2007 period.

presentation, GovGuam must be given the opportunity to take substantial discovery, since most of the data and evidence relevant to how effective competition has actually been in producing reasonable rates cannot be obtained without discovery.[3]

Third, since the discovery GovGuam needs to be able to adequately address the issue of effective competition is largely the same evidence it would need for its stand-alone cost presentation, bifurcation does not appear likely to expedite or streamline ths proceeding.

A. The Board Has A Statutory Obligation to Determine the Reasonableness of the Challenged Rate Structures Whether or Not Competitive Alternatives Exist or the Guam Trade is Qualitatively or Structurally Competitive.

The Board's Phase II determination that it need not assess the reasonableness of the challenged rates if it finds that there was effective competition in the Guam trade is, with respect, clearly erroneous. While Congress has expressly mandated such a threshold test as a prerequisite for review of rail rates[4] and pipeline rates under ICCTA[5], there is no similar statutory support for limiting the Board's review of the reasonableness of rates in the Guam trade to situations where the Board finds a lack of effective competition.

More to the point, the Supreme Court has expressly rejected the very proposition advanced in the Phase II Decision – that an agency may change a Congressionally mandated scheme of rate regulation into a scheme of rate regulation only where effective competition does not exist. In *MCI*

---

[3] Substantial discovery regarding market dominance issues is typically granted by the Board in rail rate cases.

[4] The Board has no jurisdiction to review the reasonableness of rail rates unless it finds that the rail carrier exercises market dominance over the issue traffic. *See* 49 U.S.C. § 10107.

[5] The Board has held that 49 U.S.C. § 15503(b)(2) limits its jurisdiction over pipeline rates in a manner consistent with the market dominance requirement applicable to rail rates. *See CF Industries, Inc. v. Koch Pipeline Co., L.P.*, 2 STB 257, 262-263 (1997).

v. AT&T, the Supreme Court prohibited the FCC from doing exactly what the Board seeks to do here – limit the exercise of its rate regulation powers where it finds there is effective competition, where there is the absence of clear statutory authority to do so:

> What we have here, in reality, is a fundamental revision of the statute, changing it from a scheme of rate regulation in long-distance common carrier communications to a scheme of rate regulation only where effective competition does not exist. That may be a good idea, but it was not the idea Congress enacted into law in 1934.

MCI v. AT&T, 512 U.S. 218, 231-232 (1994). The Supreme Court's decision in *MCI* merely confirmed the Court's determination 20 years earlier that an agency is not free to rely exclusively on market forces to determine the reasonableness of rates where the statute the agency is bound to enforce requires it to determine whether rates are reasonable:

> [W]e should also stress that, in our view, the prevailing price in the marketplace cannot be the final measure of "just and reasonable" rates mandated by the Act. It is abundantly clear from the history of the Act and from the events that prompted its adoption that Congress considered that the natural gas industry was heavily concentrated and that monopolistic forces were distorting the market price for natural gas.
>
> * * *
>
> In subjecting producers to regulation because of anti-competitive conditions in the industry, Congress could not have assumed that "just and reasonable" rates could conclusively be determined by reference to market price.
>
> * * *
>
> In concluding that the Commission lacks the authority to place exclusive reliance on market prices, we bow to our perception of legislative intent. It may be, as some economists have persuasively argued, that the assumptions of the 1930s about the competitive structure of the natural gas industry, if true then, are no longer true today. It may be also be that control of prices in this industry, in a time of shortage, if such there be, is counterproductive to the interests of the consumer in increasing the production of natural gas. It is not the Court's role, however, to overturn Congressional assumptions embedded into the framework of regulation established by the Act. This is a proper task for the Legislature, where the public interest may be considered from the multi-faceted points of view of the representational process.

FPC v. Texaco, Inc., 417 U.S. 380, 398-400 (1974) (citation omitted) (interpreting the rate reasonableness provision of the Federal Power Act).

The Supreme Court's admonitions in *Texaco* and *MCI* that an agency may not determine that market forces are adequate to ensure reasonable rates in the face of a Congressional determination that regulation of rates is required, is particularly compelling in this case. ICCTA (including Section 13701, the rate reasonableness provision at issue here) was enacted by Congress in December 1995, and became effective on January 1, 1996. As noted by the Supreme Court in *Texaco* with respect to the natural gas industry, Congress's decision to require rate regulation and tariff filing for the Guam trade in ICCTA is a compelling indication that Congress considered the Guam trade subject to anti-competitive conditions requiring the direct rate regulation provided in Section 13701 (*i.e.*, that rates be "reasonable"). The market dominance threshold test for the review of rates established in the Phase II Decision, as applied to the challenged September 1996 base rates, would result in the Board overriding Congress's conclusions about the Guam trade almost as soon as ICCTA became effective. Even if there were some basis in law for the Board to second-guess Congress's conclusions about the state of competition in the Guam trade, GovGuam is not aware of any seismic shifts in the condition of the Guam trade that would justify such a dramatic repudiation of Congressional intent only a few months after Congress enacted ICCTA.

The Phase II Decision appears to rely heavily on case law addressing FERC's use of market-based factors in its ratemaking decisions. *See* Phase II Decision at 5, n.9-11. However, none of the cited cases support the market dominance threshold test established in the Phase II Decision. To the contrary, the case law relating to FERC's use of market-based determinations to establish rates clearly demonstrates that the Phase II market dominance threshold could not withstand judicial

scrutiny.

For example, in *California ex rel. Lockyer v. FERC*, the 9th Circuit made clear that a determination that a market is competitive cannot substitute for a determination that rates are reasonable. The *Lockyer* court held that FERC could allow electric utilities to establish market-based (as opposed to traditional cost-based) rates upon a finding that they lacked market power, but that the determination that the market was competitive did not absolve FERC from its statutory obligation to review the resulting rates to ensure that the market actually produced reasonable rates:

> [A]s *MCI* and *Maislin* affirmed, the market-based tariff cannot be structured so as to virtually deregulate an industry and remove it from statutorily-required oversight. The structure of the tariff complied with the FPA, so long as it was coupled with enforceable post-approval reporting that would enable FERC to determine whether the rates were "just and reasonable" and whether market forces were truly determining the price.

Lockyer California ex rel. Lockyer v. FERC, 383 F.3d 1006, 1014 (9th Cir. 2004).[6] Similarly, in a very recent case, the same court noted:

> Market-based rate authority provides a meaningful opportunity for prior review and approval of rates under the FPA, ... *only* insofar as FERC implements and uses an effective oversight mechanism *after* the market-based rate authorization is initially granted. Only then can FERC meet its statutory duty to ensure that *all* rates are "just and reasonable."

Public Utility District No. 1 v. FERC, 471 F.3d 1053, 1081 (9th Cir. 2006).

The *Louisiana Energy & Power Authority* and *Elizabethtown* decisions cited by the Board reached the same conclusion announced in *Lockyer*. Both decisions made clear that the use of market forces to set rates is permissible only if there is a meaningful opportunity to review rates for reasonableness and an adequate remedy should the purportedly competitive market not produce

---

[6] Indeed, FERC itself has affirmed that it does not contend that "approval of a market-based tariff based on market forces alone would comply with the FPA or the filed rate doctrine." *Lockyer*, 383 F.3d at 1013.

reasonable rates.

In *Elizabethtown*, the Court upheld FERC's reliance on market forces to establish rates because, unlike the FPC rate scheme struck down in the *Texaco* case, the FERC rate scheme provided for a review of the rates for reasonableness even after FERC determined the market to be competitive. *See Elizabethtown Gas Co. v. FERC*, 10 F.3d 866, 870 (D.C. Cir. 1993) ("Here, in contrast, the FERC has made it clear that it will exercise its § 5 authority (upon its own motion or upon that of a complainant) to assure that a market (*i.e.*, negotiated rate) is just and reasonable."). Similarly, in *Louisiana Energy & Power Authority*, the Court approved FERC's grant of market-based ratemaking authority to an electric utility based on FERC's commitment to allow those rates to be challenged subsequently should the market fail to produce reasonable rates. *See Louisiana Energy & Power Authority v. FERC*, 141 F.3d 364, 370 (D.C. Cir. 1998) ("FERC notes that should the Commission's sanguine predictions about market conduct turn out to be incorrect, LEPA can file a new complaint for any abuses of market power that do occur.").

Thus, the Supreme Court and the Courts of Appeals have made clear that market-based ratemaking must be accompanied by a meaningful opportunity for *post hoc* review and an adequate remedy in the event the market-based rates prove not to be reasonable. The Phase II market dominance test, which provides only for a determination that competitive alternatives exist or the market structure appears to be competitive, fails because the Board intends to rely solely on a finding of effective competition to deny rate reasonableness review. In doing so, the Board would fail to provide the meaningful *post hoc* review and adequate remedy required by the courts to ensure that challenged rates are reasonable.

B. Any Market Dominance Analysis Sufficient to Meet the Board's Duty to Ensure That the Challenged Rates Are Reasonable Necessarily Requires the Board to Consider the Rates, Costs and Other Factual Circumstances Prevailing During the 1996 to 2007 Time Period.

The belief expressed in the Phase II Decision that the Board may rely solely on a finding of competitiveness in the Guam trade to ensure that the challenged rates are reasonable is not only erroneous as a matter of law, it also ignores the very real possibility that even a seemingly competitive market may not produce the reasonable rates required by ICCTA. Collusive behavior, parallel pricing, dislocations in related markets, and other market-distorting behavior can result in grossly unreasonable rates in markets that by many measures could be considered "competitive."

The circumstances giving rise to the *Lockyer* case amply demonstrate why a determination that a market is structurally competitive, or that competitive alternatives exist, cannot ensure that the rates established in the market are reasonable. As described in *Lockyer*, FERC granted market-based ratemaking authority to electric utilities in the "forward" market based upon its finding that they lacked market power and that the "forward" market was competitive. However, as a result of artificial manipulation of the associated "spot" market on a massive scale, the competitive forces relied upon by FERC in establishing its market-based ratemaking scheme produced shockingly unreasonable rates in the "forward" market that gouged California consumers of electric power. *See Lockyer*, 383 F.3d at 1014-1015. ("Despite the promise of truly competitive market-based rates, the California energy market was subjected to artificial manipulation on a massive scale.")

Where rates appear to be grossly disproportionate in relation to costs or rates for comparable services, there is reason to question whether the market is in fact functioning as an effective constraint on rates. Here, the shockingly high rates for Guam traffic, when compared to cargo bound

for the Far East and traveling on the same vessels, raises just that question.[7] Under the circumstances, the only way to determine whether any competitive alternatives or other competitive factors are sufficient to produce reasonable rates in the Guam market is to conduct a detailed analysis not just of the structural or qualitative factors at play in the market, but also the rates, costs, contractual and financial arrangements, operations and other factual circumstances prevailing in the Guam trade for the last 10 years. However, GovGuam cannot even begin to conduct such an analysis without substantial discovery from the carriers about the details of their operations and arrangements.

For example, GovGuam needs, at a minimum, discovery relating to:

(1) the rate history for both Guam cargo, as well as other cargo, carried on the vessels serving Guam;

(2) the rate history of eastbound and westbound Pacific Rim cargo and military cargo, including whether the tariff rates were intermodal or port-to-port rates;

(3) the portion of the Guam trade subject to confidential contracts;

(4) contractual arrangements between vessel owners and the Guam trade operators, including charter agreements and the MASSA contract and associated amendments;

(5) vessel utilization data in the Guam trade;

(6) revenue, cost, margin and profit analyses of Guam traffic and other traffic moved in the Guam trade;

(7) pricing policies relating to Guam, Pacific Rim and military cargo;

(8) data relating to trans-Pacific service, including service to Guam and/or Guam and Hawaii;

(9) information relating to the vessels deployed in the Guam trade over the time period 1996 through 2007, including capacity, draft, operating costs, capital costs, actual fuel costs, lease costs and alternative uses for these vessels; and

---

[7] Guam rates can be up to three times or more the rates for trans-Pacific cargo – even though the trans-Pacific cargo moves greater distances on the same vessels. *See* Initial Verified Statement of Philip H. Burris, filed April 23, 2002.

(10) the history of all fuel surcharges and/or other surcharges imposed in the Guam trade;

(11) the data, methodology and circumstances giving rise to the 1997 and 2006 MARAD reports.[8]

C. Since Substantial Discovery Will Be Required to Conduct a Complete Market Dominance Analysis, With Much of That Discovery Equally Applicable to the SAWC Analysis, Bifurcation Will Not Materially Expedite or Streamline This Proceeding.

As discussed in the preceding section, GovGuam believes it needs substantial discovery to prepare an adequate analysis of the competitiveness of the Guam market and whether the factors upon which the carriers apparently intend to rely have been effective in constraining rates. A considerable amount of that discovery will be equally applicable to rate issues and the construction of standalone water carriers. Consequently, bifurcating Phase III of the proceeding to deal with market dominance issues first does not appear to be likely to materially expedite or streamline this proceeding unless the Board intends to deny GovGuam the opportunity to take discovery or limit the scope of that discovery.

---

[8] As GovGuam has previously noted, there is reason to question both the accuracy and objectivity of the 2006 MARAD Report. Letter from GovGuam, filed with the Board on June 1, 2006. Indeed, the Report indicates that the data used to prepare the Report is derived in large part from information contained in a report entitled "Competitiveness in the Domestic Noncontiguous Liner Shipping Markets, June 2004," by Reeve & Associates. The Reeve Report appears to have been prepared at the behest of the Maritime Cabotage Task Force, a trade association of ocean carriers, including the respondents in this proceeding.

GovGuam's counsel submitted an FOIA request to MARAD shortly after the 2006 Report was suddenly issued while the Board's Phase II Decision was pending. Unfortunately, MARAD has failed to produce any materials pertaining to those reports, including documents relating to why or by whom the Report was commissioned. Consequently, GovGuam's counsel has been compelled to file suit to compel their production. *See Galland Kharasch Greenberg Fellman & Swirsky, PC v. United States Department of Transportation; and United States Maritime Administration*, U.S. District Court for the District of Columbia, Case No. 1:07CV0366.

However, as discussed below, there does not appear to be any reason to deny discovery on market dominance issues when such discovery is routinely allowed in rail and pipeline rate cases. Similarly, there is no statutory basis for limiting the scope of discovery or GovGuam's presentation to exclude consideration of rates and costs, unlike the situation in rail and pipeline cases. As a result, GovGuam respectfully suggests that the Board should reconsider its decision to bifurcate Phase III.[9]

II. THE BOARD SHOULD REVISE THE PROCEDURAL SCHEDULE TO ALLOW SUFFICIENT TIME FOR THE COMPLETION OF DISCOVERY ON MARKET DOMINANCE ISSUES

The Board's Phase II Decision establishes an abbreviated schedule for submission of market dominance evidence and makes no provision for discovery. While much of the information necessary to address market dominance issues is likely in the possession of, or easily available to, the carriers, the same cannot be said for GovGuam. As described above, GovGuam needs substantial discovery on market dominance issues, and cannot, in all fairness, prepare an adequate response to the carriers' evidence without the aid of discovery.

GovGuam believes that market dominance discovery has always been allowed in rail rate cases. In addition, extensive discovery appears to have been allowed in the *Koch Pipeline*

---

[9] GovGuam notes that the Board does not bifurcate rate proceedings except in cases in which there appears to be a substantial likelihood that the market dominance threshold cannot be overcome. In this proceeding, the Board apparently believes that the MARAD reports relating to the trades in the noncontiguous domestic trades are sufficient evidence of effective competition to support bifurcation in this case. However, the MARAD study appears to have been substantially influenced by the carriers' industry trade association. Moreover, the MARAD "study" does not reference, much less explain, the dramatic disparity in rates for cargo bound to Guam as opposed to other trans-Pacific traffic moving on the very same vessels serving Guam. Since the ultimate issue in this case is whether the rates are reasonable, the MARAD report's failure to even consider, much less explain, these gross rate disparities undercuts the utility of the MARAD reports in this proceeding. Since the MARAD reports appear to be one of the primary, if not *the* primary, basis for bifurcation to consider market dominance issues, GovGuam respectfully suggests that the failure of the MARAD reports to address the rate disparities in the Guam trade is another compelling reason for the Board to reconsider its decision to bifurcate this proceeding.

proceeding under Board's pipeline jurisdiction. *See Koch*, 2 STB at 266-268 (providing for 120 days for completion of discovery). There does not appear to be any reason to deny GovGuam the right to conduct the discovery necessary to prepare its defense on market dominance issues – particularly in light of the fact that the Board intends the market dominance issue to be potentially dispositive. While GovGuam appreciates that the Board appears to be attempting to move along this now almost nine-year old case – a goal GovGuam believes is shared by all parties to this case – GovGuam believes there is no practical way to escape the need for discovery on market dominance issues in this case.

Accordingly, should the Board determine not to reconsider its bifurcation of this proceeding, GovGuam respectfully requests that the Board revise the schedule to provide for adequate time to take discovery on market dominance issues. GovGuam respectfully suggests that the Board convene a meeting of counsel to discuss the scope and timing of discovery and, if necessary, assign an administrative law judge to resolve any discovery disputes.

III. THE BOARD'S DETERMINATION THAT THE ZOR WILL BE APPLIED TO INCREASE THE MAXIMUM LAWFUL AGGREGATE BASE RATES ESTABLISHED IN THIS CASE IS PREMATURE

The Board's Phase II Decision appears to hold that the ZOR will be applied uniformly to the maximum lawful aggregate base rates established in this proceeding starting in 1996. Indeed, the Board appears to assume that the effect of the ZOR will make future rate prescriptions unnecessary. *See* Phase II Decision at 13 ("We doubt that a prescription of future aggregate rate levels would be necessary, given the cumulative effect of the ZOR over the 10-year period during which this complaint has been pending."). However, GovGuam believes that the Board's conclusions about the applicability of the ZOR are premature. As explained more fully below, the Board should

reconsider this part of its Phase II Decision until the underlying facts are more fully developed, since it cannot be determined at this point whether or to what extent the ZOR will impact the maximum lawful aggregate base rates established in this proceeding.

A. The ZOR Applies Only to "Port to Port" Rates.

The ZOR provision applicable to the Guam trade, Section 13701(b)(1), provides in pertinent part:

> (1) In general. – For purposes of this section, a rate or division of a motor carrier for service in noncontiguous domestic trade or water carrier for port-to-port service in that trade is reasonable if the aggregate of increases and decreases in any such rate or division is not more than 7.5% above, or more than 10% below, the rate or division in effect one year before the effective date of the proposed date or division.

49 U.S.C. § 13701(d)(1). Accordingly, the plain language of Section 13701(d)(1) makes clear that the ZOR applies only to port-to-port rates and not to intermodal rates.

B. Respondents Have Indicated That the Vast Majority of the Traffic At Issue Moved Under Intermodal Rates Not Subject to the ZOR.

The extent to which the ZOR will impact the maximum lawful aggregate base rates established in this proceeding will depend on the nature of the rates files by the carriers and under which the affected traffic moved. If the Guam traffic during the 1996 and forward period was primarily under intermodal rates not subject to the ZOR, the ZOR provision would appear to have a limited impact in this proceeding. While GovGuam cannot determine the type of rates used in the Guam trade without discovery, the carriers themselves have indicated that the vast majority of rates filed in the Guam trade were intermodal rates. *See, e.g.*, Motion to Dismiss Complaint, filed February 16, 1999, at 9 ("Since Matson entered the trade in early 1996, Matson has offered both port-to-port and intermodal service, but almost all of the service it has provided has been intermodal service, which it has provided in conjunction with numerous motor carriers."). As a result, there is

substantial reason to believe that the ZOR will have limited impact in this proceeding, and should not be applied as described in the Board's Phase II Decision either to limit reparations or to serve as a basis for refusing to prescribe a rate for the future.

WHEREFORE, GovGuam respectfully prays that the Board reconsider its Phase II Decision as set forth more fully herein.

Respectfully submitted,

Edward D. Greenberg
David K. Monroe
GALLAND KHARASCH GREENBERG
FELLMAN & SWIRSKY, P.C.
1054 Thirty-First Street, NW
Washington, DC 20037
Telephone: 202/342-5200
Facsimile: 202/342-5219
Email: egreenberg@gkglaw.com
dmonroe@gkglaw.com

Attorneys for Plaintiff
GOVERNMENT OF
THE TERRITORY OF GUAM

DATE: February 22, 2007

CERTIFICATE OF SERVICE

I do hereby certify that I have delivered a copy of the foregoing document to the following addressees at the addresses stated by the means designated this 22nd day of February 2007:

VIA EMAIL

Richard A. Allen, Esquire
Scott M. Zimmerman, Esquire
ZUCKERT SCOUTT & RASENBERGER LLP
888 Seventeenth Street, NW – Suite 700
Washington, DC 20006-3309
Email: raallen@zsrlaw.com

Counsel for
MATSON NAVIGATION COMPANY, INC.

C. Jonathan Benner, Esquire
Leonard L. Fleisig, Esquire
TROUTMAN SANDERS LLP
401 Ninth Street, NW – Suite 1000
Washington, DC 20004
Email: jonathan.benner@troutmansanders.com

Counsel for
HORIZON LINES, LLC

VIA UNITED STATES MAIL

Kevin C. O'Rourke
MATSON NAVIGATION COMPANY, INC.
555 Twelfth Street
Oakland, CA 94607

Bruno Maestri, Esquire
NORFOLK SOUTHERN CORPORATION
1500 K Street, NW – Suite 375
Washington, DC 20005

Rick A. Rude, Esquire
DHX, INC.
207 Park Avenue – Suite 103
Falls Church, VA 22046

Peter J. Shudtz, Esquire
CSX CORPORATION
One James Center
901 East Cary Street
Richmond, VA 23119

Linda D. Thomas